

Affin Bank Bhd v Mahanbir Singh a/l Manmohon Singh & Anor A

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24-743 OF 2006(4) B
AZAHAR MOHAMED J
20 SEPTEMBER 2007

Land Law — Restraints on dealings — Caveats — Application for removal of — Caveat entered by shareholder of a proprietor company — Whether caveatable interests C

The first defendant was a director and shareholder of MDV Technical Services Sdn Bhd (in liquidation), which was the registered proprietor of a piece of land ('land'). The second defendant was the Pengarah Tanah dan Galian Johor. On 5 September 1992, the plaintiff granted RM13m banking facilities to United Cannery Sdn Bhd (in liquidation) ('the borrower'). The banking facilities were partly secured by a third party charge over the land, by MDV Technical Services Sdn Bhd ('the chargor'). When the borrower and chargor defaulted in repayment, the plaintiff commenced foreclosure proceedings. Subsequently, the chargor company was wound up on 23 March 1994 and pursuant to s 226(3) of the Companies Act 1965, the plaintiff had on 18 July 1996 obtained leave from the court to proceed with realisation of the charge and obtained an order for sale in respect of the said land from the court. However, the receiver and manager appointed over the borrower then negotiated with the official receiver for a sale of the said land, which would result in redemption of the plaintiffs charge. The first defendant had on 2 December 2002 lodged a private caveat over the land. A registrar's caveat has been entered over the said land on 20 August 2003. The plaintiff had relied on the expectation that the official receiver appointed over the chargor company tried to effect the sale of the said land and thereafter to redeem the charge. However, such sale did not materialize. The plaintiff now filed an application for the removal of the private caveat and the registrar's caveat. D
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Held:

- (1) The important point to note was that the registered owner of the land was the chargor company and not the first defendant. The first defendant's caveat was entered in his own name as a shareholder of the chargor company for the express purpose of protecting his personal interest (see para 6). I

- A (2) The Court of Appeal had identified registrable interests as interests relating to ownership, leases, charges and easements. The case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 supported the principle that a shareholder of a proprietor company had no caveatable interests in the company's land (see para 8).
- B (3) The first defendant's application vide Form 19B did not show any caveatable interest at all as the registered owner of the land was the chargor company. Since the first defendant failed to satisfy the first tier test, the caveat must be removed without the necessity of going any further (see para 11).
- C (4) As for the registrar's caveat, as the second defendant had not filed any affidavit in reply to any of the plaintiffs affidavits, the second defendant was deemed to have admitted all of the plaintiffs averments in the plaintiffs first and second affidavits (see para 12).
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[Bahasa Malaysia summary]

- E Defendan pertama adalah pengarah dan pemegang saham MDV Technical Services Sdn Bhd (dalam likuidasi), yang merupakan tuanpunya berdaftar sebidang tanah ('hartanah'). Defendan kedua adalah Pengarah Tanah dan Galian Johor. Pada 5 September 1992, plaintiff memberikan RM13 juta kemudahan pbankkan kepada United Cannery Sdn Bhd (dalam likuidasi) ('peminjam'). Sebahagian kemudahan pbankkan tersebut dijamin oleh
- F satu gadaian pihak ketiga atas hartanah tersebut, oleh MDV Technical Services Sdn Bhd ('penggadai'). Apabila peminjam dan penggadai gagal untuk membuat bayaran balik pinjaman tersebut, plaintiff memulakan prosiding halang tebus gadaian. Selepas itu, syarikat penggadai telah digulungkan pada 23 Mac 1994 dan mengikut s 226(3) Akta Syarikat 1965,
- G plaintiff telah pada 18 Julai 1996 memperolehi kebenaran mahkamah untuk merealisasikan gadaian tersebut dan memperolehi satu perintah jualan berhubungan dengan hartanah tersebut daripada mahkamah. Akan tetapi, penerima dan pengurus yang dilantik kepada peminjam kemudiannya telah berbincang dengan pegawai penerima untuk jualan hartanah tersebut, yang
- H akan dapat menebuskan gadaian plaintiff. Defendan pertama telah pada 2 Disember 2002 memasukkan satu kaveat persendirian ke atas hartanah tersebut. Satu kaveat pendaftar juga telah dimasukkan ke atas hartanah tersebut pada 20 Ogos 2003. Plaintiff telah bergantung kepada jangkaan
- I bahawa pegawai penerima yang dilantik ke atas syarikat penggadai akan cuba menjualkan hartanah tersebut dan kemudiannya menebus gadaian tersebut. Akan tetapi, jualan tersebut tidak terjadi. Plaintiff kini memfailkan satu permohonan untuk mengeluarkan kaveat persendirian tersebut dan juga kaveat pendaftar tersebut.

Diputuskan:

- (1) Perkara penting yang patut diperhatikan ialah tuanpunya berdaftar hartanah tersebut adalah syarikat penggadai dan bukannya defendan pertama. Kaveat defendan pertama telah dimasukkan di atas namanya sendiri sebagai pemegang saham syarikat penggadai untuk tujuan khusus bagi melindungi hak peribadinya (lihat perenggan 6).
- (2) Mahkamah Rayuan telah mengenalpasti kepentingan yang boleh didaftar sebagai kepentingan-kepentingan berhubungan dengan hakmilik, pajakan-pajakan, gadaian-gadaian dan easemen. Kes *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 menyokong prinsip bahawa seseorang pemegang saham di pemilik syarikat tidak mempunyai kepentingan yang boleh didaftar ke atas tanah syarikat tersebut (lihat perenggan 8).
- (3) Permohonan defendan melalui borang 19B langsung tidak menunjukkan sebarang kepentingan yang boleh didaftar oleh kerana tuanpunya berdaftar hartanah tersebut adalah syarikat penggadai. Oleh kerana defendan pertama gagal memenuhi ujian pertama, kaveat tersebut patut dikeluarkan tanpa keperluan untuk meneruskan dengan ujian lain (lihat perenggan 11).
- (4) Berhubung dengan kaveat pendaftar, oleh kerana defendan kedua tidak memfailkan sebarang affidavit jawapan kepada sebarang affidavit-afidavit plaintif, defendan kedua dikatakan telah mengakui kesemua kenyataan plaintif di affidavit-afidavit plaintif yang pertama dan kedua (lihat perenggan 12).]

Notes

For cases on caveats, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3480–3824.

Cases referred to

Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212 (refd)
Hew Sook Ying v Hiw Tin Hee [1992] 2 MLJ 189 (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (folld)
Natsafe (M) Sdn Bhd v Loi Teak Kuong [2005] 6 MLJ 454 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (folld)

Legislation referred to

Companies Act 1965 s 226(3)
 National Land Code ss 321(3)(C), 323, 327, 418

Tan Gian Chung (Shook Lim & Bok) for the plaintiff:
HS Gill (Tejindarpal Kaur with him) Tejindarpal & Co for the first defendant.

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Azahar Mohamed J:

B [1] By this application in encl 2 the plaintiff prayed, inter-alia, for the following reliefs:

- C** (a) An order pursuant to s 327 of the National Land Code 1965, that the private caveat registered vide Presentation No 267/2002 lodged by the first defendant against the land held under HS(D) No 46317, PTD No 22712, Mukim Plentong, Daerah Johor Bahru, Negeri Johor Darul Takzim (the said land) be forthwith removed and that the Land Registrar do all that is necessary to ensure such removal within seven days' written notice of the Order made herein;
- D** (b) An order that the first defendant and/or his nominess or agents be restrained from entering any further caveat on the said land held;
- E** (c) An order pursuant to ss 321(3)(C) and 418 of the National Land Code, that the second defendant's decision in entering a registrar's caveat of presentation no 29280/2003 over the said land be set aside and that the Land Registrar do all that is necessary to ensure that the registrar's caveat be forthwith removed within seven days' written notice of the order made herein;
- F** (d) Alternatively, a declaration that the interest of the plaintiff as a registered chargee of the aforesaid Land is indefeasible and takes priority over the alleged claim protected by the registrar's caveat and a consequential order pursuant to s 417 of the National Land Code, that the registrar's caveat be removed and that the Land Registrar do all that is necessary to ensure such removal within seven days' written notice of the order made herein;
- G** (e) An order that the first defendant to forthwith pay damages to the plaintiff for losses incurred by the plaintiff as a result of the entry of the said private caveat, upon such damages having been assessed by the court.

H [2] The first defendant was a director and shareholder of MDV Technical Services Sdn Bhd (in liquidation), which is the registered proprietor of the said land. The second defendant is the Pengarah Tanah dan Galian Johor.

I [3] The background facts, which resulted in the present application, are as follows. On 5 September 1992, the plaintiff granted RM13m banking facilities comprising a term loan, an overdraft, a foreign bills purchase and an export credit refinancing facility to United Cannery Sdn Bhd (in liquidation) ('the borrower'). The banking facilities were partly secured by a third party

charge over the land, by MDV Technical Services Sdn Bhd ('the chargor'). The borrower utilized the credit facilities. As it turned out, the borrower and chargor defaulted in repayment of the facilities. The plaintiff then took steps to recover the credit facilities including commencing foreclosure proceedings to realize its charge over the land. Subsequently, the chargor company was wound up on 23 March 1994 and pursuant to s 226(3) of the Companies Act 1965, the plaintiff had on 18 July 1996 obtained leave from the court in Johore Bahru High Court No 28-101-1993 to proceed with realisation of the charge. The plaintiff had, in exercising its rights as a registered chargee of the said land, on 10 December 1998 obtained an order for sale in respect of the said from the court. However, the receiver and manager appointed over the borrower then negotiated with the official receiver for a sale of the said land, which would result in redemption of the plaintiffs charge. The first defendant had on 2 December 2002 lodged a private caveat lodged over the land and registered under presentation no 267/2002 ('the private caveat'). On 20 February 2003 the plaintiff filed its notice of intention to continue with the foreclosure of the land. A registrar's caveat has been entered over the said land on 20 August 2003 and registered under presentation no 29280/2003 ('the registrar caveat'). On 22 Jun 2004, the plaintiff obtained order in terms of its summons for directions for a new auction date and a new reserve price for the sale of the land. On or about 10 September 2004, the first defendant filed an application for, inter-alia, an injunction to restrain the plaintiff from disposing off the said land by auction. The grounds of the first defendant's application were, inter alia, that the said land was the subject matter of a civil suit before this court. The first defendant's application was however dismissed on 13 September 2004. In the interim, the plaintiff had relied on the expectation that the official receiver appointed over the chargor company try to effect the sale of the said land and thereafter to redeem the charge. However, such sale did not materialize. The plaintiff then decided to proceed with a public auction of the said land to enforce the order for sale. In this respect the plaintiff conducted, through its solicitors, a land search on the said land on 4 January 2006 and by that search it was discovered the existence of the private caveat and the registrar's caveat. That is why, on 1 March 2006 the plaintiff filed the present application.

[4] I shall now deal with the application for the removal of the private caveat. Given that the plaintiff is the registered chargee of the land, its registered title is prima facie evidence of its unfettered right under the charge to deal with the land. As a result, it is for the defendant to satisfy the court that there are sufficient grounds in fact and in law for the private caveat to remain. It is well settled that as a rule the test for the removal of private caveat is a three-stage test:

- (1) the claim contained in the application made by the caveator in Form 19B under s 323 of the National Land Code ('NLC') amounts in law to a caveatable interest;

A (2) if the above is answered Jin the affirmative, then the caveator must show that his claim to an interest in the land discloses a serious question meriting a trial; and

B (3) in the event that the caveator manages to cross the hurdle above, then he must show that on the balance of justice/balance of convenience, it would be better to maintain the caveat.

(See *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 and *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719).

C [5] Thus, the first stage is the examination of the grounds expressed in the application for caveat ie Form 19B of the NLC. In the first defendant's application to enter private caveat ('Form 19B') dated 20 December 2001, the first defendant stated that:

D (a) I am a shareholder of MDV Technical Service Sdn Bhd. and make this application on my own behalf as a shareholder, having interest in this company which is the registered owner of this land,

E (b) I intend to file an action on behalf of myself to ask the court to determine on this issue and I am filing this caveat to protect my interest.

F [6] The important point to note here is that the registered owner of the land is the chargor company and not the first defendant. The first defendant's caveat was entered in his own name as a shareholder of the chargor company for the express purpose of protecting his personal interest. The question is: can the grounds stated in Form 19B therein under s 323 of the NLC amounts in law to a caveatable interest? Now, s 323 says:

G (1) The persons and bodies at whose instance a private caveat may be entered are:

H (a) any person or body claiming title to, or any registrable interest in, any alienated land or undivided share in any alienated land or any right to such title or interest;

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

I (c) the guardian or next friend of any minor claiming to be entitled as mentioned in para (b).

(2) Any such person or body wishing to apply for the entry of such a caveat shall do so in Form 19B and such application shall be attested in accordance with the provisions of s 211 and shall state therein the nature of the claim on which his application is based, and whether the

caveat is to be expressed to bind the land itself or an undivided share in the land or a particular interest only.

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(3) Any application under this section shall be accompanied by —

- (a) the prescribed fee;
- (b) the grounds giving rise to the claim thereto, verified by a statutory declaration by the applicant or his advocate and solicitor; and
- (c) if relating to a part of the land a description or a plan of the land affected, and if relating to an undivided share in the land or a part thereof a description, which is sufficient for identification.

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[7] The Court of Appeal in the *Luggage Distributor's* case sets out what can be caveatable interests and held that only registrable interests in land are capable of being protected by entry of private caveats. Gopal Sri Ram JCA when delivering the judgment of the court laid down the following principles:

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The parameters of caveatability under s 323(1)(a) are therefore circumscribed by these words: 'title' and 'registrable interest'. It is only one who makes a claim to either of these in land may enter a private caveat.

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Although the words 'title' and 'registrable interest' are not defined by the Code, their meaning may be gathered from the scheme of the Code and from the indefeasibility provision, namely, s 340(1). The latter points to a bifurcation between title (the equivalent of the English fee simple) and registrable interests, that is, leases, charges and easements.

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In my judgment, the position that obtains under the Code, so far as is relevant to the present appeal, may be stated in the following way. The Code creates three categories of interests in land. They are as follows.

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Category 1: Registrable interests in land.

Only certain interests are capable of registration. Within this are two subcategories, namely:

- (a) Registered title. This may be in perpetuity or for a term of years. It pertains to ownership of land. The 'owner' is termed by the Code as a 'registered proprietor';
- (b) Registrable interests falling short of ownership. These are leases charges and easements.

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Registration carries with it a bundle of rights, which includes, subject to any restriction imposed by the alienating authority, the right to effect a transfer of the particular registered interest. The Code, in s 340(1), confers indefeasibility upon registered title and interests in land. Section 340(2) creates exceptions, which, if established, may operate to defeat such registered title or interest;

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- A** Category 2: Interests that are incapable of registration.
- These include tenancies exempt from registration, which may be protected by means of an endorsement upon the register document of title;
- B** Category 3: Caveatable interests.
- These are unregistered interests which are capable of protection by the entry of a private caveat. In the context of s 323(l)(a), it is only a claim to the interests falling under category 1(a) and (b) above that may be protected by the entry of a private caveat. Cases falling under category (2) are not caveatable interests. A private caveat cannot, therefore, be entered by one who claims such an interest.
- C** Protection for such interests must be secured in the manner prescribed by the Code.
- D** [8] The Court of Appeal has identified registrable interests as interests relating to ownership, leases, charges and easements. To my mind, *Luggage Distributor's* case supports the principle that a shareholder of a proprietor company has no caveatable interests in the company's land. This principle was shown in two cases.
- E** [9] Firstly, the decision of our Supreme Court in *Hew Sook Ying v Hiw Tin Hee* [1992] 2 MLJ 189, where it was held that the caveat entered by the respondent under s 323 of the NLC in his own name for the express purpose of protecting his personal interest which can only mean that he had done so
- F** as a shareholder or on behalf of all shareholders of the company. The court ruled that the caveat should be removed and damages to be assessed by the lower court. Mohamed Azmi SCJ in writing for the court had this to say at p 195:
- G** The application for removal in the present appeal is a bit unusual in that the applicant is not the registered proprietor, and the caveat to be removed is entered not in the name of the company as a registered proprietor but in the personal name of the respondent, a third party. The caveator is not the typical purchaser but on the contrary it is the purchaser who is applying for the removal of the caveat
- H** entered by the third party. In our opinion the real dispute is not between the appellant purchaser and the company as registered proprietor but is between the appellant and the respondent who as the managing director is unhappy with the sale transaction carried out by the directors. As a managing director, he feels he has a duty as a trustee to protect the interest of the shareholders against any misdeed of the directors.
- I** The problem in this case is to identify the caveator's claim to title or registrable interest in the land under s 323(1) NLC. What is his caveatable claim?

Further down His Lordship added:

The contemporaneous document in Form 19B does not support the respondent's assertion in his affidavit that the caveat is lodged by him as a managing director to protect the interest of the company, but is expressly for the purpose of protecting his own personal interest, possibly as a shareholder.

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And further down at p 71 His Lordship concluded:

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In entering the caveat in his own name for the purpose of protecting his own personal interest, it can only mean that he has done so as a shareholder or on behalf of all shareholders of the company.

[10] And, secondly the decision in *Natsafe (M) Sdn Bhd v Loi Teak Kuong* [2005] 6 MLJ 454. There, the defendant was one of the shareholders in the plaintiff. There was a dispute amongst plaintiffs shareholders. Subsequent thereto, the shareholders entered into a settlement agreement, which terms, among others were: (1) two shareholders namely, Loi Tek Hua and Loi Tesk Ping were to purchase the shares of Wong Min Ngik and the defendant in the plaintiff; (ii) the purchase price to be settled, firstly, by way of distribution of the plaintiffs assets and secondly by way of cash. The plaintiff was in financial difficulties. In order to repay its debts, the plaintiff resolved to sell its property to another. The defendant entered a private caveat on the said property. The plaintiff applied to the court for the removal of the said caveat. The defendant claimed that he had a caveatable interest in the property on the grounds that: (i) he was the shareholder of the plaintiff; and (ii) the settlement agreement conferred him rights in the property. It was held that the defendant did not have a caveatable interest within the meaning of s 323(1) of the National Land Code. Form 19B as filed by the defendant did not vest in him, as a shareholder, any caveatable interest in the property. Addressing the judgment of the Supreme Court in *Hew Sook Ying v Hiw Tin Hee*, Abdul Malek Ishak J (as he then was) said at p 462:

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It is trite law that the plaintiff, a limited company incorporated under the Companies Act 1965, and its shareholders are two separate legal entities (*Hew Sook Ying v Hiw Tin Hee* [1992] 2 MLJ 189). To reiterate, the property is registered in the name of the plaintiff and not the shareholders of the plaintiff. It must be recalled to mind that the Supreme Court in *Hew Sook Ying v. Hiw Tin Hee* [1992] 2 MLJ 189 emphasised, in clear words, that in a case where the company was the registered proprietor of the land and had sold the land to the appellant and had handed to the appellant the instrument of transfer and the document of title for registration, it was impossible to envisage how the respondent there as the managing director either personally or as a shareholder or as an officer of the company, could be said to have a caveatable claim to title or registrable interest under s 323(1) of the NLC. Likewise here, as a shareholder of the plaintiff, the defendant has no caveatable interest, at all, in the property. Even the settlement agreement does not confer any caveatable interest in the defendant. The plaintiff is not a party to the settlement agreement. The parties involved in the settlement agreement are the shareholders of the plaintiff. That being the case, the defendant

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A cannot enforce the settlement agreement against the plaintiff. It is for this very reason that the settlement agreement does not confer any caveatable interest to the defendant.

B [11] Returning to our present case and applying the foregoing principles to the facts of the case before me, the first defendant's application vide Form 19B does not show any caveatable interest at all as the registered owner of the land is the chargor company. Since the first defendant fails to satisfy the first tier test, the caveat must be removed without the necessity of going any further. In my judgment, the grounds stated by the first defendant in Form 19B therein are inadequate in law to support a private caveat. As Gopal Sri Ram JCA said in *Luggage Distributor's* case at p 741 of the report:

D In my judgment, there are three stages through which an inquiry of this nature must go. The first stage is the examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated therein are insufficient in law to support a caveat, then cadit quaestio, and the caveat must be removed without the necessity of going any further.

E [12] Now I come to a different point. It concerns the registrar's caveat, which had been entered over the said land on 20 August 2003. In this regard, the two defendant has not filed any affidavit in reply to any of the plaintiffs affidavits. Thus, on the authority of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, the second defendant is deemed to have admitted all of the plaintiffs averments in the plaintiffs first and second affidavits including the following:

- F (a) that the indefeasible interest of the plaintiff as registered chargee takes priority over any alleged interest protected by the registrar's caveat; and
- G (b) the registrar's caveat ought to be removed and cancelled.

[13] Therefore, based on all the aforesaid reasons and having regard to the facts of this case, I made an order in terms of encl 2 with costs to the plaintiffs

H *Order accordingly.*

Reported by Sally Kee

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